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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HELEN SMITH,

Petitioner,

vs.

FRED H. HARMSEN, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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November 6, 1984

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QUESTIONS PRESENTED[1]

1. Does the district court judgment entered pursuant to Fed. R. Civ. P. 23(c)(3), affirmed by the decision below, which expands petitioner's liability to a shareholder class far beyond that established by the jury's special liability and damage verdicts, violate the seventh amendment prohibition against courts of the United States reexamining facts tried and resolved by the jury?

2. Did the court below improperly apply the 1982 amendment to 28 U.S.C. § 1961, governing interest on money judgments in federal courts, to a judgment entered in January 1980, almost three years prior to the effective date of the amendment?

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[1] Parties to the proceedings below: Named plaintiffs-appellees were Fred H. Harmsen, Ken Hansen, Samuel Rosenberg and James P. Young, suing individually and on behalf of a class eventually certified as including "all persons and entities, excluding the defendant shareholders, who were beneficial owners of United States National Bank common stock on October 18, 1983. . . ." (CR 246); defendants-appellants were C. Arnholt Smith, Helen Smith, Carol Smith Shannon and Philip A. Toft. Parties named in the district court's December 2, 1983 judgment who did not appeal were M.J. Coen, U.S. Holding Company, San Diego Padres and First California Company. J.A. Smith and First National Finance Corporation were parties to the prior appeal but settled and/or were dismissed from the case prior to entry of the December 1983 judgment.

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No. _____

IN THE

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OCTOBER TERM, 1984

HELEN SMITH,

Petitioner,

vs.

FRED H. HARMSEN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Helen Smith respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 6, 1984.

OPINION BELOW

The opinion of the court of appeals (an unpublished memorandum decision) and the pertinent judgment (and subsequent order) of the United States District Court for the Southern District of California are reproduced in the Appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE, CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Rule 23(c)(3), Federal Rules of Civil Procedure:

> The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

2. Amendment VII, United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. 28 U.S.C. § 1961 (1982):

> § 1961. Interest
>
> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

4. 28 U.S.C. § 1961(a) (Supp. 1984), *as amended by* the Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 302(a), 96 Stat. 25, 55-56:

> § 1961. Interest
>
> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is

held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

STATEMENT OF THE CASE

This petition arises out of complex securities fraud class action litigation initiated in 1973 as a result of the government's closure of the United States National Bank of San Diego ("USNB"). Jurisdiction in the district court was invoked pursuant to 12 U.S.C. § 94 and 28 U.S.C. §§ 1331 and 1337 with respect to alleged violations of the National Bank Act; pursuant to 15 U.S.C. § 78aa with respect to alleged violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; and pursuant to principles of pendent jurisdiction with respect to various state law claims. The district court certified a class consisting of all beneficial owners of USNB common stock on October 18, 1973, excluding defendants.

In 1979 the case proceeded to trial against C. Arnholt Smith (an officer and the controlling shareholder of USNB), petitioner (C. Arnholt's wife) and other non-settling defendants. At the liability phase of the bifurcated trial, special jury verdicts were returned against petitioner finding her liable for secondary violations of Rule 10b-5 (as a controlling person, aider and abettor and conspirator), fraud, conspiracy to defraud, and conspiracy to abuse control; these verdicts specified that March 1, 1971 to October 18, 1973 was the time period for which petitioner had been found liable on each count. App. at 27a-31a, 33a.

The jury was again provided with special verdict forms at the end of the damages phase of the trial. The forms listed the separate counts for which each defendant had been found liable and the corresponding period of liability, all as set forth in the liability verdicts. App. at 36a-43a. In petitioner's case, the jury's verdict assessed damages against her on each count of $6,241,170.02, except on the count for conspiracy to abuse control (Count IX), as to which she was assessed damages of $5,858,660.91.[2] It is apparent from the verdict forms and the damage schedules that were considered by the jury that these damage amounts were based on acquisitions of USNB stock by class members only *after* March 1, 1971, the earliest date petitioner was found to have engaged in any wrongful conduct.[3]

On January 4, 1980 the district court entered judgment against defendants in favor of the named plaintiffs and "the class which they represent." App. at 19a-23a.

The district court's actions were in the main affirmed on appeal; the Ninth Circuit, however, remanded the case with instructions to enter judgment in accordance with Rule 23, to design and implement a claims procedure, and

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[2] There is no obvious explanation for the fact that the damages assessed against petitioner on Count IX are slightly less than those assessed against her on the other five counts. This is irrelevant, however, as the argument would be identical even if the jury had assessed damages against petitioner on Count IX in the same amount as on the other five counts.

[3] At plaintiffs' behest, the district court had appointed a special master to develop data to be submitted to the jury at the damages phase of the trial; the evidence concerning compensatory damages consisted almost exclusively of the testimony of the special master and various schedules he had prepared which estimated the market value (as of the date of acquisition) of shares acquired by class members between March 1, 1962 and October 18, 1973. The jury's damage verdicts against petitioner were computed from the special master's schedules for the period March 1, 1971 to October 18, 1973.

to consider any feasible methods of returning excess damages funds to defendants, with interest. *Harmsen* v. *Smith*, 693 F.2d 932 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 104 S. Ct. 89 (1983).

On December 2, 1983 the district court entered its judgment, purportedly in conformity with the mandate of the Ninth Circuit. With respect to each of the counts, save one, as to which petitioner had been found liable, the judgment specified that it was in favor of a class of "all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73" who "still held said shares on 10/18/73. . . ." App. at 5a, 9a. Over petitioner's objection, the district court specified that on Count IX (conspiracy to abuse control), the judgment was in "favor of all common shareholders of U.S.N.B. on 10/18/73," regardless of when they acquired their shares. App. at 6a. Although the December 2, 1983 judgment provided that excess funds after distribution would be returned to defendants, the erroneous expansion of petitioner's liability under Count IX to include class members who acquired their shares *prior* to March 1, 1971 substantially reduces the likelihood that excess funds will be available for return to petitioner.

In a memorandum decision filed concurrently with the judgment, the district court rejected petitioner's argument that the judgment with respect to Count IX should be restricted, stating that "the court finds the defendants are liable to *all* USNB shareholders under Count IX (conspiracy to abuse control)." (Emphasis in original).

The December 2, 1983 judgment went on to provide in paragraph 12 that "[i]nterest on all of the above sums accrues at the legal rate per 28 U.S.C. § 1961, beginning January 4, 1980," the date of the original judgment, and that "[t]his Judgment is entered *nunc pro tunc* as of January 4, 1980." App. at 10a.

Thereafter, petitioner and other parties sought clarification and/or amendment of the judgment in various respects.

including the applicable rate of interest. At the time the initial judgment was entered on January 4, 1980, 28 U.S.C. § 1961 provided that interest on judgments in civil cases "shall be calculated from the date of the entry of the judgment, at the rate allowed by State law." Effective October 1, 1982 (*see* Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 402, 96 Stat. 25, 57), § 1961 was amended to provide that such interest "shall be calculated . . . at a rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment."

By order entered December 20, 1983 (App. at 11a), the district court mandated that

> [i]nterest on the judgments of all defendants shall be calculated to include interest at the rate of 7% from January 4, 1980 through October 1, 1982. From the period October 1, 1983 [sic: petitioner concedes that this should read "1982"] through the present date, interest will be fixed by the option price of U.S. Treasury bills immediately prior to January 4, 1980.

Petitioner appealed the interest and class definition rulings (and others) to the Ninth Circuit. On the class definition issue, petitioner reiterated her position that the district court judgment with respect to Count IX had expanded her liability beyond that found by the jury, and thereby contravened the seventh amendment. With respect to the interest issue, while petitioner conceded that interest could properly be assessed from the date of the 1980 judgment, *see, e.g., Turner* v. *Japan Lines, Ltd.*, 702 F.2d 752, 754 (9th Cir. 1983), she argued that the 1982 amendment to 28 U.S.C. § 1961 did not apply to judgments entered prior to its effective date (October 1, 1982). The 1980 judgment would therefore accrue interest not at the Treasury bill rate, but "at the rate allowed by State law" pursuant to the version of § 1961 in effect at the time that judgment was entered. Under the ruling below, petitioner has paid more than $275,000 in additional interest.

By unpublished memorandum decision filed August 6, 1984, the Ninth Circuit affirmed the district court's rulings. App. at 1a. The court's discussion of the class definition and interest issues is reproduced here in its entirety:

> The amended judgment does not violate the seventh amendment. The jury was instructed that according to California law, *see Jones* v. *H.F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969), liability runs to all USNB shareholders on Count IX. Thus, the damage award on that count is proper.
>
> The district court properly calculated the interest rate. The purpose of the *nunc pro tunc* order was to protect appellees from the consequences of delay not attributable to their own fault and should not operate to deprive them of a change in law that will benefit them. Nothing in 28 U.S.C. § 1961 rules out the district court's reasonable interpretation.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT WITH RESPECT TO THE SEVENTH AMENDMENT ISSUE BECAUSE OF THE NEED FOR GUIDANCE REGARDING THE INTERPLAY BETWEEN FED. R. CIV. P. 23(c)(3) AND THE SEVENTH AMENDMENT

The jury was instructed that each defendant *could* be found liable for all damages flowing from the conspiracy, regardless of when a particular defendant joined, or disassociated himself from the conspiracy. 693 F.2d at 942. That the jury did *not* so find is obvious from the amounts of damages assessed against defendants expressly found to have joined the conspiracy at different times.

On Count IX, the jury's special verdict regarding liability expressly states that the first date petitioner joined the conspiracy was "1 March 1971." App. at 33a. The jury's

special verdict regarding damages similarly so states. App. at 38a. The damages assessed against petitioner were based solely on acquisitions of USNB stock after March 1, 1971, and thus were less than the amounts assessed against defendants found by the jury to have joined the conspiracy earlier. The Ninth Circuit recognized what the jury had done:

> The jury chose, however, to assess damages against [petitioner and defendants other than C. Arnholt Smith] for the period the jury found that each was actually involved in C. Arnholt's deceptions. In this way, the jury found [petitioner and certain other defendants] liable only to purchasers who bought their shares after 1968 [March 1, 1971 with respect to petitioner]; the named plaintiffs are therefore not able to recover from these defendants.

693 F.2d at 942.

The trial court was instructed to enter judgment in accordance with Rule 23(c)(3), which requires that the judgment "specify or describe those . . . whom the court finds to be members of the class." *See* 693 F.2d at 942. Upon remand, however, the district court entered judgment pursuant to which petitioner's liability on Count IX runs, not just to plaintiffs who acquired their shares after March 1, 1971, but to *all* class members. This is directly contrary to the jury's factual determination that petitioner did not engage in any wrongful conduct until March 1, 1971 and was liable only to those class members who acquired their USNB shares after that date.

Rule 23(c)(3) requires that the judgment in a class action specify those who are members of the class for purposes of determining who may share in a favorable judgment and who will be bound by an adverse one. Yet the *jury* determined the fact that petitioner did not join the conspiracy until March 1, 1971, and assessed against her on

Count IX only a portion of the total damages suffered by the class. Thus the district court's attempted compliance with Rule 23(c)(3), affirmed by the Ninth Circuit, has the *effect* of "re-examining" those facts found by the jury by allowing claims to be filed against petitioner by class members to whom she was found not liable by the jury. This contravenes the express prohibition of the seventh amendment.

This Court has concisely summarized the meaning of the seventh amendment:

> The aim of the amendment ... is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury....

Baltimore & Carolina Line, Inc. v. *Redman*, 295 U.S. 654, 657 (1935). More specifically, the seventh amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).

In *Ross v. Bernard*, 396 U.S. 531, 541 (1970), this Court observed that "it now seems settled in the lower federal courts that class action plaintiffs may obtain a jury trial on any legal issues they present." This Court has also noted that the Rules Enabling Act, 28 U.S.C. § 2072, pursuant to which Rule 23 was adopted, provides that "[s]uch rules ... shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." *Colgrove v. Battin*, 413 U.S. 149, 161 (1973). *Cf. City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1388 (S.D.N.Y. 1972) ("While Rule 23 has been given broad application, no one suggests that it has repealed the Seventh Amendment").

While the great majority of class actions are settled prior to trial, more and more of them are being tried to juries. *See e.g. Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir.) *cert. denied*, 459 U.S. 838, 908 (1982).
potential for significant tension between (a) the court's obligation under Rule 23(c)(3) to specify in the judgment in a class action the class in whose favor or against whom the judgment runs, and (b) the seventh amendment's prohibition against redetermining a fact found by the jury. The Court can forestall such a development by granting review in this case and making clear to the lower courts that in discharging their obligations under Rule 23(c)(3) they must take care to respect the dictates of the seventh amendment.

There is another more immediate reason to grant review of this issue. By doing so the Court can eliminate the potential for disputes developing among members of the class that may result in future litigation. Since the jury verdicts against petitioner are based solely on acquisitions of USNB stock after March 1, 1971, class members who acquired stock after that date will properly expect that only they are entitled to share in the damages paid by petitioner. The district court judgment, however, permits class members who acquired USNB stock prior to March 1, 1971 to assert claims to the damages paid by petitioner. Since the damages assessed against petitioner are based only on acquisitions of USNB stock after March 1, 1971, such claims by pre-March 1971 acquirers will reduce the amounts which post-March 1971 acquirers ultimately recover. The potential for conflict among members of the class created by the district court's judgment is enhanced by the fact that petitioner is the only defendant from whom plaintiffs have been able to collect compensatory damages.

II. THE INTEREST ISSUE

A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS TO THE EFFECT THAT 28 U.S.C. § 1961 IS NOT APPLICABLE TO JUDGMENTS ENTERED BEFORE THE EFFECTIVE DATE OF THE 1982 AMENDMENT

The Ninth Circuit held below that "[n]othing in 28 U.S.C. § 1961 rules out the district court's reasonable interpretation" to the effect that the higher (Treasury bill) interest rate mandated by the 1982 amendment to § 1961, rather than the lower (state law) rate provided by the former version of the statute, applies, as of the effective date of the amendment, to a judgment entered prior to that date.

Three of the other four federal courts of appeal that have decided the question agree with petitioner's position that the 1982 amendment to 28 U.S.C. § 1961 does not apply to judgments entered before October 1, 1982, the effective date of the amendment. *Elias v. Ford Motor Co.*, 734 F.2d 463, 467-68 & n.6 (1st Cir. 1984); *Merit Insurance Co. v. Leatherby Insurance Co.*, 728 F.2d 943, 944 (7th Cir. 1984); *United States v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983). *Accord, Devex Corp. v. General Motors Corp.*, 569 F. Supp. 1354, 1365-66 & n.2 (D. Del. 1983); *Litton Systems, Inc. v. AT&T*, 568 F. Supp. 507, 510-14 (S.D.N.Y. 1983); *Peterson v. Crown Financial Corp.*, 553 F. Supp. 114, 116-17 & n.4 (E.D. Pa. 1982). A district court holding to the same effect was affirmed without opinion by the Third Circuit. *United States ex rel. Billows Electric Supply Co. v. E.J.T. Construction Co.*, 557 F. Supp. 514, 516-17 & n.1 (E.D. Pa. 1983), *aff'd mem.*, 729 F.2d 1450 (3d Cir. 1984).

The Eighth Circuit disagrees, having held that although the amendment "became effective on October 1, 1982, after the award of fees in this case, . . . it is the law now, and

should be used by the district court. *Cf., e.g., United States v. The Schooner Peggy*, 1 Cranch 103, 110 (1801)." *R.W.T. v. Dalton*, 712 F.2d 1225, 1235 (8th Cir.), *cert. denied*, ____ U.S. ____, 104 S. Ct. 527 (1983).[4]

The Fifth Circuit has sent conflicting signals on this issue. *Compare Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 543 n.1 (5th Cir. 1983) (en banc) (per curiam) (dictum) ("the rate of interest [on a pre-effective date judgment] *will be* equal to" the rate set by the 1982 amendment) (emphasis added) *with Musial v. A&A Boats, Inc.*, 696 F.2d 1149, 1154 (5th Cir. 1983) (in post-effective date case, "pursuant to 28 U.S.C. § 1961 'such interest shall be calculated from the date of entry of the judgment, at the rate allowed by State law'" as provided by the unamended statute).

The D.C. Circuit also has sent conflicting signals, but in a single opinion. In *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1103 (D.C. Cir. 1984), the court cited the 1982 (i.e., unamended) version of the statute as applicable to a pre-effective date judgment, but also cited, in another connection, *R.W.T. v. Dalton*, which holds that the amended version of § 1961 applies to pre-effective date judgments.

The Second Circuit has reserved the question, stating that "[t]he district court will have to determine whether interest accruing after October 1, 1982 until the entry of the new judgment should be calculated at the Treasury bill rate in accordance with the current version of 28 U.S.C. § 1961 which became effective on that date." *United States v. Hannon*, 728 F.2d 142, 145-46 & n.7 (2d Cir. 1984).

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[4] *But see Clymore v. Far-Mar-Co, Inc.*, 576 F. Supp. 1161, 1166-67 (W.D. Mo. 1983). Pursuant to a directive of the Eighth Circuit (709 F.2d 499, 505-06 (8th Cir. 1983)) that, on remand, "the interest rate should be determined under 28 U.S.C. § 1961 (Supp. 1983)," the district court applied the state law rate of interest to two pre-effective date judgments, and the Treasury bill rate to its post-effective date judgment.

This is not a mere "transition period" question, the importance of which will diminish with the passage of time. The reported cases indicate that the issue will be litigated with even greater frequency, as more judgments entered prior to the Act's effective date wend their way through the appellate process.[5]

Research has disclosed at least fifteen cases in the federal courts of appeals (and dozens in the district courts) which involve, expressly or by implication, the interest issue presented here. Given the relatively small percentage of district and appellate court orders and opinions which are published, *and the likelihood that this issue arises most frequently in the context of (unreported) motion practice before the district courts*, it is safe to assume that the issue presented here consumes significant judicial resources.

All such litigation represents a deadweight loss to the courts and to litigants, because a definitive answer would obviate all future law and motion practice and appeals on the issue. Once resolved, the proper rule of § 1961 would be easily administrable. Indeed, inconsistent results on this issue are a blemish on the hand of justice: litigants similarly situated earn (or pay) interest on judgments at wildly varying rates. Such unfairness is unnecessary, inconsistent with congressional intent to create uniformity, and easily remediable.

B. THE DECISION BELOW IS ERRONEOUS AS A MATTER OF STATUTORY INTERPRETATION, AND THE CONFLICT CREATED MUST BE RESOLVED IN ORDER TO EFFECTUATE THE WILL OF CONGRESS

The Ninth Circuit cited no authority in support of its

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[5] The judgment at issue in the *Hannon* case was entered in 1969; in *Laffey*, in 1974. The judgment in this case antedates the effective date of the amendment by almost three years.

conclusion that it was permissible for the district court to apply the 1982 amendment to a judgment entered in 1980. In reaching the same conclusion, the Eighth Circuit cited only *United States v. The Schooner Peggy*, 1 Cranch 103 (1801), in which Chief Justice Marshall stated that "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Id.* at 110. *Accord, Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281 (1969) ("an appellate court must apply the law in effect at the time it renders its decision") (footnote omitted).

These truisms govern, however, only where the new law in fact applies to pending cases, either by the express terms of the statute or pursuant to the will of Congress. "[A] court is to apply the law in effect at the time it renders its decision, *unless ... there is statutory direction or legislative history to the contrary.*" *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974) (emphasis added). Here there is both.

Analysis of an "issue of statutory construction 'must begin with the language of the statute itself.'" *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 580 (1982) (quoting *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980)). Admittedly, apart from the inference of prospectivity created by the use of the forward-looking phrase "interest *shall be* allowed," the language of 28 U.S.C. § 1961 sheds little light on the question of whether Congress intended it to apply to judgments entered prior to its effective date.

The legislative history of § 302(a) of the Act is much more direct; it spells out the intent of Congress to set a "realistic and nationally uniform rate of interest on judgments in the Federal courts...." S. Rep. No. 275, 97th Cong., 2d Sess. 1, 11, *reprinted in* 1982 U.S. Code Cong. &

Ad. News 11, 21. At the same time, Congress intended to eliminate "an economic incentive . . . for a losing defendant to appeal a judgment and accumulate interest on a judgment award at the commercial rate during the pendency of the appeal." *Id.* The revision was necessary because prior to October 1, 1982 post-judgment interest in federal courts was governed by widely divergent state laws, and because the unprecedented high interest rates of 1980 and 1981 had begun to decline noticeably by 1982.

Thus, congressional intent was threefold: (1) to compensate plaintiffs more closely in accord with economic reality than was permitted by the laws of most states; (2) to provide for a uniform rate of interest on all money judgments entered in federal courts; and (3) to discourage frivolous appeals. Application of the 1982 amendment to judgments entered prior to its effective date is inconsistent with all three purposes.

First, "Congress must surely have been aware" of "the clear trend of declining interest rates which was well under way at the time Congress amended § 1961. . . ." *Litton Systems*, 568 F. Supp. at 513. The application of pre-1982 interest rates to pre-existing judgments would result in systematic over-compensation of judgment creditors, rather than compensation at a "realistic . . . rate of interest."[6]

---

[6] Congress could constitutionally have mandated a rate that would fluctuate along with market rates. It did not do so; rather, interest on a particular judgment was fixed for all time according to economic circumstances extant at the time the judgment was entered. This strongly suggests that the congressional goals of uniformity and discouraging frivolous appeals were considered more important than the ancillary goal of compensating judgment debtors for delay in payment at a more realistic rate. Indeed, the Senate version of § 302 would have pegged post-judgment interest to the prime rate, thereby more closely approximating an economic return on unpaid damage awards. *See* S. Rep. No. 275, 97th Cong., 2d Sess. 1, 11, 30, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 21, 40.

Second, *post hoc* imposition of a higher interest rate will not serve the congressional goal of discouraging frivolous appeals, as pre-effective date judgments would already have been appealed before there was any indication that Congress would subject judgment debtor appellants to a higher, market-related interest rate.

Third, Congress desired to subject all district court judgments to a uniform rate of interest. Quite apart from the existing conflict among the circuits, the decision below undercuts the goal of uniformity because it will result in application of the T-bill rate only to those pre-effective date judgments appealed and affirmed after October 1, 1982; on those pre-effective date judgments not appealed, interest presumably would continue to be assessed at the applicable state law rate.

The foregoing discussion demonstrates a congressional intention that the 1982 amendment to 28 U.S.C. § 1961 apply only to judgments entered after its effective date. This conclusion is confirmed by a June 22, 1982 memorandum from the General Counsel to the Administrative Office of the United States Courts to all United States judges and judicial branch executives on the subject of "Post-Judgment Interest," in which the General Counsel stated that "the new rate will apply only to judgments entered on or after [October 1, 1982]. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside." App. at 13a-18a.

Most important, however, is the fact that Congress did not specifically and expressly provide that, as of the effective date of the Act, interest on existing judgments was to be calculated at the new, higher rate. Certainly it would have been easy enough to do so. Furthermore, had Congress desired that result, the obvious and sensible approach would have been enactment of a requirement that interest on existing judgments be calculated from October 1, 1982 at the T-bill rate *as of that date*, rather

than at the T-bill rate as it stood "immediately prior to the date of the judgment"; in the face of declining rates, such a provision would have assured an interest rate more closely reflecting current market conditions. Petitioner submits that the failure to provide expressly for application of the new law to existing judgments is, under the circumstances, persuasive evidence that Congress intended precisely the opposite result.

CONCLUSION

Review and correction of the seventh amendment ruling below will provide needed guidance to the lower federal courts on the interplay between Rule 23(c)(3) and the role of the jury, and will mitigate the probability of conflicts among class members in this and other cases.

Review and correction of the Ninth Circuit's disposition of the interest issue is necessary to effectuate the intent of Congress in amending 28 U.S.C. § 1961, and will eliminate what the reported cases strongly suggest is a significant volume of litigation in the lower federal courts.

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

APPENDIX A

AUG 8, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-5507, 84-5508
84-5516, 84-5517

D.C. No.
CV-73-460-WBE
(Southern California)

FRED H. HARMSEN, *et al.*,
Plaintiffs-Appellees,

v.

C. ARNHOLT SMITH, *et al.*,
Defendants-Appellants.

FILED
August 6, 1984

PHILLIP B. WINBERRY
Clerk,
U.S. Court of Appeals

DOCKETED

MEMORANDUM*

Before: SKOPIL and SCHROEDER, Circuit Judges, and AGUILAR,** District Judge.

---

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

** The Honorable Robert Aguilar, United States District Judge for the Northern District of California, sitting by designation.

These appeals are without merit. We properly concluded in *Harmsen v. Smith*, 693 F.2d 932 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 89 (1983), that there was sufficient evidence to support a finding of liability of Helen Smith. The law of the case should stand unless there is substantially new evidence, new controlling authority, or unless the prior decision was clearly erroneous. *Handi Investment Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981). Appellants have made no showing of mistake by this court.

Appellants' other arguments must also fail. The amended judgment does not violate the seventh amendment. The jury was instructed that according to California law, *see Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969), liability runs to all USNB shareholders on Count IX. Thus, the damage award on that count is proper.

The district court properly calculated the interest rate. The purpose of the *nunc pro tunc* order was to protect appellees from the consequences of delay not attributable to their own fault and should not operate to deprive them of a change in law that will benefit them. Nothing in 28 U.S.C. § 1961 rules out the district court's reasonable interpretation.

The amended judgment does identify the classes with sufficient specificity to satisfy Fed. R. Civ. P. 23. Rule 23(c)(3) requires the judgment to "include and describe" the class, and amended judgment provides a clear description.

Finally, the amended judgment is sufficiently final to support execution. Appellants cannot successfully argue both that the amended judgment is final for purposes of review but not for purposes of execution.

Affirmed.

A TRUE COPY
ATTEST OCT 24 1984
PHILLIP B. WINBERRY
CLERK OF COURT
by Rhonda M. Kochanz, Deputy Clerk
RHONDA M. KOCHANZ

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Consolidated Civil Actions
Nos. 73-460-E and 74-345-E

FRED H. HARMSEN, *et al.*,

Plaintiffs,

v.

C. ARNHOLT SMITH, *et al.*,

Defendants.

ENTERED
December 2, 1983
Clerk, U.S. District Court
Southern District of
California

FILED
December 1, 1983
Clerk, U.S. District Court
Southern District of
California

JUDGMENT

The claims of named plaintiffs FRED H. HARMSEN, KEN HANSEN, SAMUEL ROSENBERG and JAMES P. YOUNG, and of the class which they represent, against defendants C. ARNHOLT SMITH, HELEN SMITH, CAROL SMITH SHANNON, PHILIP A. TOFT, M.J. COEN, U.S. HOLDING COMPANY, SAN DIEGO PADRES and FIRST CALIFORNIA COMPANY, came on for jury trial on August 6, 1979 for the liability phase, and, before the same jury, on December 6, 1979 for the damage phase. The issues having been duly tried, and the jury having rendered its liability verdict on October 12, 1979 and its damage verdict on December 21, 1979,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is as follows:

1. As to defendant C. ARNHOLT SMITH, judgment against said defendant as in favor of the named plaintiffs and the classes or sub-classes identified below, on the following counts and in the following amounts:

COUNT I	$12,298,708.11	. In favor of all common shareholders of U.S.N.B. on 10/18/73
COUNT II . . .	$12,061,417.72	. In favor of all purchasers of U.S.N.B. common stock between 3/1/62 and 10/18/73
COUNT V. . . .	$ 8,689,021.25	. In favor of all purchasers of U.S.N.B. common stock between 3/1/68 and 10/18/73
COUNT VI . . .	$12,061,417.72	. In favor of all purchasers of U.S.N.B. common stock between 3/1/62 and 10/18/73
COUNT VII . .	$11,614,538.21	. In favor of all purchasers of U.S.N.B. common stock between 3/1/63 and 10/18/73
COUNT VIII. .	$11,085,494.77	. In favor of all common shareholders of U.S.N.B. on 10/18/73
COUNT IX . . .	$10,722,476.62	. In favor of all common shareholders of U.S.N.B. on 10/18/73

Punitive Damages (Counts VI, VII, VIII and IX only)	$11,000,000.00	. In favor of all common shareholders of U.S.N.B. on 10/18/73

Provided, however, that each amount as aforesaid, except the amount of punitive damages, is reduced by $1,838,694.00.

2. As to defendant HELEN SMITH, judgment against said defendant and in favor of the named plaintiffs and the classes and sub-classes which they represent, on the following counts and in the following amounts:

COUNT III . . .	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT IV . . .	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT V	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT VI . . .	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT VII . .	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73

COUNT IX . . .	$ 5,858,660.91	. In favor of all common shareholders of U.S.N.B. on 10/18/73
Punitive Damages (Counts VI, VII and IX only) . .	$ 750,000.00	. In favor of all common shareholders of U.S.N.B. on 10/18/73

Provided, however, that each amount as aforesaid, except the amount of punitive damages, is reduced by $1,838,694.00.

3. As to defendant CAROL SMITH SHANNON, judgment against said defendant and in favor of the named plaintiffs and the classes and sub-classes which they represent on the following counts and in the following amounts:

COUNT III . . .	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT IV . . .	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT V	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT VI . . .	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT VII . .	$ 6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73

COUNT IX . . .	$ 5,858,660.91	. In favor of all common shareholders of U.S.N.B. on 10/18/73
Punitive Damages (Counts VI, VII and IX only) . .	$ 3,000,000.00	. In favor of all common shareholders of U.S.N.B. on 10/18/73

Provided, however, that each amount as aforesaid, except the amount of punitive damages, is reduced by $1,838,694.00.

4. As to defendant PHILIP A. TOFT, judgment against said defendant and in favor of the named plaintiffs and the classes and sub-classes which they represent on the following counts and in the following amounts:

COUNT IV . . .	$ 8,689,021.25	. In favor of all purchasers of U.S.N.B. common stock between 3/1/68 and 10/18/73
COUNT V	$ 8,689,021.25	. In favor of all purchasers of U.S.N.B. common stock between 3/1/68 and 10/18/73
COUNT VI . . .	$ 8,689,021.25	. In favor of all purchasers of U.S.N.B. commons stock between 3/1/68 and 10/18/73
COUNT VII . .	$ 8,689,021.25	. In favor of all purchasers of U.S.N.B. common stock between 3/1/68 and 10/18/73
COUNT IX . . .	$ 8,083,508.79	. In favor of all common shareholders of U.S.N.B. on 10/18/73

Punitive Damages (Counts VI, VII and IX only) . . $	1.00	. In favor of all common shareholders of U.S.N.B. on 10/18/73

Provided, however, that each amount as aforesaid, except the amount of punitive damages, is reduced by $1,838,694.00.

5. As to defendant M. J. COEN, judgment against said defendant and in favor of the named plaintiffs and classes and sub-classes which they represent, on the following counts and in the following amounts:

COUNT III . . . $	6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT IV . . . $	6,241,170.02	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT V . . . . $	6,689,021.25	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73
COUNT VI . . . $	6,241,170.02	. In favor of all purchasers of U.S.N.B. commons stock between 3/1/71 and 10/18/73
COUNT VII . . $	8,689,021.25	. In favor of all purchasers of U.S.N.B. common stock between 3/1/71 and 10/18/73

COUNT IX . . .	$ 8,083,508.79	. In favor of all common shareholders of U.S.N.B. on 10/18/73
Punitive Damages (Counts VI, VII and IX only) . .	$ 3,000,000.00	. In favor of all common shareholders of U.S.N.B. on 10/18/73

Provided, however, that each amount as aforesaid, except the amount of punitive damages, is reduced by $1,838,694.00.

6. As to defendant U.S. HOLDING COMPANY, judgment against said defendant and in favor of the named plaintiffs and all common shareholders of U.S.N.B. on 10/18/73 on all counts in the amount of $12,298,708.11 in compensatory damages, and $1.00 in punitive damages.

7. As to defendant SAN DIEGO PADRES, judgment against said defendant and in favor of the named plaintiffs and all common shareholders of U.S.N.B. on 10/18/73 on all counts in the amount of $12,298,708.11 in compensatory damages, and $1.00 in punitive damages.

8. As to defendant FIRST CALIFORNIA COMPANY, judgment against said defendant and in favor of the named plaintiffs and all common shareholders of U.S.N.B. on 10/18/73 on all counts in the amount of $12,298,708.11 in compensatory damages, and $1.00 in punitive damages.

9. As to all defendants, judgment against all defendants and in favor of the named plaintiffs and all common shareholders of U.S.N.B. on 10/18/73 for the costs of suit herein.

10. As used in this Judgment "all purchasers" between given dates means all persons who (a) purchased U.S.N.B. common stock between said dates; and (b) still held said shares on 10/18/73; and (c) who are not defendants herein; and (d) excludes Westgate California Insurance Co. As

used in this Judgment, "all common shareholders" on 10/18/73 specifically excludes defendants herein and Westgate California Insurance Co.

11. The liability of each defendant is no greater than the largest sum such defendant has been found liable for as to any one count, plus the amount of any punitive damages for that particular defendant. Any payment by any defendant shall reduce by like amount the amount of liability of every other defendant, except punitive damages which are the sole responsibility of the particular defendant against whom punitive damages have been assessed.

12. Interest on all of the above sums accrues at the legal rate per 28 U.S.C. § 1961, beginning January 4, 1980.

13. In the event that there are excess damage funds pursuant to this Judgment after distribution of all claims to claimants and other authorized disbursements, such excess funds shall be returned to defendants pursuant to further order of Court.

14. This Judgment is entered *nunc pro tunc* as of January 4, 1980.

DATED: 11/30/83

/s/ WILLIAM B. ENRIGHT

Judge, U.S. District Court

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil Nos.
73-460-E(M) and 74-345-E(M)

FRED H. HARMSEN, *et al.*,

Plaintiffs,

v.

C. ARNHOLT SMITH, *et al.*,

Defendants.

FILED and ENTERED
December 20, 1983

Clerk, U.S. District Court
Southern District of
California

ORDER

Helen Smith, joined by defendants C. Arnholt Smith, Phillip Toft and Carol Smith Shannon, moves for an order regarding the substitution of cash for trust property, for identification of plaintiffs who have been paid, and for a list of opt-outs. Upon due consideration of the parties' memoranda and exhibits, and the arguments advanced at the hearing, this court hereby rules as follows:

1. The amount of cash required to secure Helen Smith's judgment liability, should the parties elect to substitute cash in place of Trust property, is compensatory damages in the amount of $4,402,476, punitive damages in the amount of $750,000, trial costs in the amount of $76,062, plus interest.

2. Interest on the judgments of all defendants shall be calculated to include interest at the rate of 7% from January 4, 1980 through October 1, 1982. From the period October 1, 1983 through the present date, interest will be fixed by the option price of U.S. Treasury bills immediately prior to January 4, 1980.

3. Helen Smith's motion for an order requiring a listing of the opt-outs is denied based upon counsel's representations that the complete list of opt-outs was filed with this court. The motion of joining defendants for a list of returned settlement notices or questionnaires is denied.

4. Plaintiffs are directed to search their records to ascertain if Westgate Life Insurance Company was among those paid off in the December 1979 distribution. Plaintiffs are requested to apprise this court of the results of said examination of their records within 10 days of the filing date of this order.

IT IS SO ORDERED.

DATED: December 19, 1983.

/s/ WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to: Plaintiffs
Defendants

APPENDIX D

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

June 22, 1982

MEMORANDUM TO ALL: United States Judges
United States Magistrates
Circuit Executives
Clerks of Court
District Circuit Executives

SUBJECT: Post-Judgment Interest

FILED
ENTERED
LODGED
RECEIVED
July 6, 1982

Clerk, U.S. District Court
Southern District of
California

Pursuant to the provisions of § 302 of the Federal Courts Improvement Act of 1982, P.L. 97-164, signed April 2, 1982, and effective October 1, 1982, post-judgment interest on most civil money judgments will be computed at a new, and varying rate.

Present law, 28 U.S.C. § 1961, ties interest rates on money judgments in the district courts (except tax cases)

to the rates allowable under state law. Section 2411 provides that in United States cases, except tax cases, the rate is 4%. Tax cases carry a rate of interest set yearly by the Secretary of Treasury—currently 20%.

The purpose of the amendments is to set a realistic national rate, which will adapt to market conditions, thereby eliminating a major incentive for the filing of otherwise inappropriate appeals. The Judicial Conference has supported such a change for a number of years.

Initially, language in the various bills would have adopted for all cases the rate set for tax cases under 26 U.S.C. § 6621. This rate is currently 20% due to the very high interest rates in 1981 and will not be readjusted until February 1983. The Office of Management and Budget pointed out the high costs to the United States that this rate would cause, and noted that it does not change sufficiently often to reflect market conditions.

I. Effective Date

There have been several recent inquiries to this office as to the interest rate which should apply to judgments entered prior to October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (section 302(a), amending 28 U.S.C. § 1961). It is our view that the new rate will apply only to judgments entered on or after that date. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

As a result, on December 8, 1981, Senator Grassley offered as an amendment on the Senate floor, the basic substance of the new provisions. Later refinements in language were made. For convenience, the full text of the amended sections, as they will read, is set out as an addendum.

The provisions of new section 1961 will apply in the district courts, to United States cases as well as private actions, but will not be applicable in the bankruptcy courts.

This section will govern also the rate of interest on judgments of the Court of Appeals for the Federal Circuit. This provision is somewhat unusual for a Circuit Court, but is necessary since it will hear cases arising from the Court of International Trade, the Claims Court, a number of quasi-judicial boards and various executive agencies. Separate provisions are also made for United States Claims Court judgments.

The first questions to arise are, of course, the practical ones of what is the rate, how is it ascertained, when is it set, when the information becomes available and the like. We shall try to answer all of these as well as the initial legal questions.

The Treasury Department holds an auction of 52-week Treasury bills every four weeks; therefore the rate will change thirteen times a year. The dates are set in advance, so that we now understand that the auction results of the September 30, 1982 auction will be initially applicable on October 1, 1982, the effective date of section 302. This assumes that Congress raises the debt limit sufficiently that an auction can be held. The precise rate will be certified to the Director of the Administrative Office by the Treasury after each auction. We are already receiving the certifications, so even if that particular auction were not held we will have certification of the applicable rate.

The Treasury Department also issues a press release which is usually carried in the Wall Street Journal and in some other papers. This reported rate may be difficult to locate. The Treasury press release calls this the "Investment Rate (Equivalent Coupon-issue Yield)." The financial press may use either name, or may not report it at all. This rate must not be confused with the average "annual investment *yield*—which is an entirely different rate used for purposes of the All-Savers Certificates.

At the request of the Director of the Administrative Office, the Treasury Department's recorded message reporting results of the most recent auctions of the 13, 26, and 52-week Treasury bills has been augmented to include the information the courts will need. That recording is reached by calling (202) 287-4100, in the Bureau of the Public Debt. The recording carries the "Equivalent Coupon-issue Yield" as such.

Judges and clerks of court will be advised by the Administrative Office of the officially certified rate.

Once the rate has been established for a particular judgment, that rate will not change even if a subsequent auction should be held before the money is paid into the court or the judgment otherwise satisfied.

Although the matter will not arise in a specific case until late October, we deem it important to answer now, before problems occur, the question of what interest rate will be applicable to a judgment entered on the same day as the auction.

As the Supreme Court most recently pointed out in the case of *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. ____, 102 S.Ct. 1235 (1982), citing its prior decisions, the analysis of an issue of statutory construction begins with the language of the statute itself. Certainly one must start with the plain ordinary meaning of the words of the legislature before looking farther afield.

The language of this statute contains sufficient specificity that we conclude the court should be guided first by the *date* of the judgment, disregarding its hour of signing. Then, a simple check of the calendar will reveal the date of the *last* auction *before* that date. By referring to the date of the judgment (rather than simply to "the judgment," which would have raised the question of computation of time, both for events such as auctions, and time periods within

which actions are to be taken) the Congress has established that the judgment is to be treated as in existence on the whole day upon which it was rendered. The usual rules as to the "date of judgment" are applicble here. (See Rule 58 and Rule 79, Federal Rules of Civil Procedure.)

I conclude that the plain language of the law requires that the interest rate on judgments entered on the same day as an auction of 52-week Treasury bills is the rate as of the preceding auction.

While in most cases the parties themselves will perform the calculations, questions will inevitably arise to be presented to the Clerk's Office. One question may well be what the statute means when it says that the interest is *computed* daily but *compounded* annually. Either one of the following two equations, both of which give the same result, may be used. (Watch out for calculator discrepancies due to dropping of digits.)

1. $\frac{\text{(Equivalent coupon-issue yield)}}{\text{365 (days)}}$ x (amt. of judgment) x (no. of days interest has run)

   Example, given a rate of 14.62%:

   $\frac{.1462}{365}$ x $20,000.00 x 12 (days) = $96.13

2. $\frac{\text{(Equivalent coupon-issue yield x amt. of judgment)}}{\text{365 (days)}}$ x (no. of days interest has run)

   Example, given a rate of 14.62%:

   $\frac{.1462 \text{ x } \$20,000.00}{365}$ x 12 (days) = $96.13

If the interest is to be compounded on account of a delay in payment of one year or more, simply multiply the equivalent coupon-issue yield by the amount of the judgment and then add that interest amount to the amount of the original

judgment. This gives you a new judgment amount to be inserted in the equation for the shorter time periods.

We will be most happy to try to answer any other questions this topic generates.

Sincerely,

CARL H. IMLAY
General Counsel

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Consolidated Civil Actions
Nos. 73-460-E and 74-345-E

FRED H. HARMSEN, KEN HANSEN, SAMUEL ROSENBERG and JAMES P. YOUNG, *et al.*,

Plaintiffs,

v.

C. ARNHOLT SMITH, *et al.*,

Defendants.

FILED
January 2, 1980
Clerk, U.S. District Court
Southern District of
California

ENTERED
January 4, 1980
Clerk, U.S. District Court
Southern District of
California

JUDGMENT

The claims of named plaintiffs FRED H. HARMSEN, KEN HANSEN, SAMUEL ROSENBERG and JAMES P. YOUNG, and of the class which they represent, against defendants C. ARNHOLT SMITH, HELEN SMITH, CAROL SMITH SHANNON, PHILIP A. TOFT, M.J. COEN, JOHN A. SMITH, FIRST NATIONAL FINANCE CORPORATION, U.S. HOLDING COMPANY, SAN DIEGO PADRES and FIRST CALIFORNIA COMPANY, came on for jury trial on August 6, 1979 for the liability phase, and, before the same jury, on December 6, 1979 for the damage phase.

The issues having been duly tried, and the jury having rendered its liability verdict on October 12, 1979 and its damage verdict on December 21, 1979,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is as follows:

1. As to defendant C. ARNHOLT SMITH, judgment against said defendant and in favor of the named plaintiffs and the class which they represent, on the following counts and in the following amounts:

COUNT I	$12,298,708.11
COUNT II	$12,061,417.72
COUNT V	$ 8,689,021.25
COUNT VI	$12,061,417.72
COUNT VII	$11,614,538.21
COUNT VIII	$11,085,494.77
COUNT IX	$10,722,476.62
Punitive Damages (Counts VI, VII, VIII and IX only)	$11,000,000.00

2. As to defendant HELEN SMITH, judgment against said defendant and in favor of the named plaintiffs and the class which they represent, on the following counts and in the following amounts:

COUNT III	$ 6,241,170.02
COUNT IV	$ 6,241,170.02
COUNT V	$ 6,241,170.02
COUNT VI	$ 6,241,170.02
COUNT VII	$ 6,241,170.02
COUNT IX	$ 5,858,660.91
Punitive Damages (Counts VI, VII and IX only)	$ 750,000.00

3. As to defendant CAROL SMITH SHANNON, judgment against said defendant and in favor of the named

plaintiffs and the class which they represent on the following counts and in the following amounts:

COUNT III	$ 6,241,170.02
COUNT IV	$ 6,241,170.02
COUNT V	$ 6,241,170.02
COUNT VI	$ 6,241,170.02
COUNT VII	$ 6,241,170.02
COUNT IX	$ 5,858,660.91
Punitive Damages (Counts VI, VII and IX only)	$ 3,000,000.00

4. As to defendant PHILIP A. TOFT, judgment against said defendant and in favor of the named plaintiffs and the class which they represent on the following counts and in the following amounts:

COUNT IV	$ 8,689,021.25
COUNT V	$ 8,689,021.25
COUNT VI	$ 8,689,021.25
COUNT VII	$ 8,689,021.25
COUNT IX	$ 8,083,508.79
Punitive Damages (Counts VI, VII and IX only)	$ 1.00

5. As to defendant M. J. COEN, judgment against said defendant and in favor of the named plaintiffs and the class which they represent on the following counts and in the following amounts:

COUNT III	$ 6,241,170.02
COUNT IV	$ 6,241,170.02
COUNT V	$ 8,689,021.25
COUNT VI	$ 6,241,170.02
COUNT VII	$ 8,689,021.25
COUNT IX	$ 8,083,508.79
Punitive Damages (Counts VI, VII and IX only)	$ 3,000,000.00

6. As to defendant JOHN A. SMITH, judgment against said defendant and in favor of the named plaintiffs and the class which they represent on the following counts and in the following amounts:

COUNT IV	$11,614,538.21
COUNT VI	$11,614,538.21
COUNT VII	$11,614,538.21
COUNT IX	$10,722,476.62
Punitive Damages (Counts VI, VII and IX only)	$ 1.00

7. As to defendant FIRST NATIONAL FINANCE CORPORATION, judgment against said defendant and in favor of the named plaintiffs and the class which they represent on the following counts and in the following amounts:

COUNT IV	$ 2,861,957.38
COUNT VI	$ 2,861,957.38
COUNT VII	$ 2,861,957.38
COUNT IX	$ 2,868,933.92
Punitive Damages (Counts VI, VII and IX only)	$ 1.00

8. As to defendant U.S. HOLDING COMPANY, judgment against said defendant and in favor of the named plaintiffs and the class which they represent on all counts in the amount of $12,298,708.11 in compensatory damages, and $1.00 in punitive damages.

9. As to defendant SAN DIEGO PADRES, judgment against said defendant and in favor of the named plaintiffs and the class which they represent on all counts in the amount of $12,298,708.11 in compensatory damages, and $1.00 in punitive damages.

10. As to defendant FIRST CALIFORNIA COMPANY, judgment against said defendant and in favor of the named plaintiffs and the class which they represent on all counts

in the amount of $12,298,708.11 in compensatory damages, and $1.00 in punitive damages.

11. As to all defendants, judgment against all defendants and in favor of the named plaintiffs and the class which they represent for the costs of suit herein.

DATED: 1/2/80

/s/ WILLIAM B. ENRIGHT
Judge, U.S. District Court

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Consolidated Civil Action
Nos. 73-460-E and 74-345-E

FRED H. HARMSEN, *et al.*,

Plaintiffs,

v.

C. ARNHOLT SMITH, *et al.*,

Defendants.

FILED
October 12, 1979

Clerk, U.S. District Court
Southern District of
California

VERDICT

We the jury in the above-entitled case, unanimously conclude and find as follows:

I
VIOLATION OF THE NATIONAL BANKING ACT

Did defendant C. ARNHOLT SMITH violate the National Banking Act during any period between March 1, 1962 and October 18, 1973, and upon which act or omission you have all unanimously agreed?

If your answer is "YES":

(1) Mark "X" after his name in column "A".

(2) State in column "C" the first date (day, month and year) for which he is liable.

(3) State in column "D" the last date (day, month and year) for which he is liable.

If your answer is "NO":

(1) Mark "X" after his name in column "B".

(2) Leave all other columns blank.

DEFENDANT	(A) "YES" Defendant Is Liable	(B) "NO" Defendant Is Not Liable	(C) FIRST DATE Defendant Became Liable	(D) LAST DATE Defendant Was Liable
C. ARNHOLT SMITH	X		1 March 1962	18 October 1973

II
VIOLATION OF RULE 10b-5

Did defendant C. ARNHOLT SMITH directly violate Rule 10b-5 for any period between March 1, 1962 through October 18, 1973, and upon which act or omission you have all unanimously agreed?

If your answer is "YES":

(1) Mark "X" in column "A".

(2) State in column "C" the first date (day, month and year) for which he is liable.

(3) State in column "D" the last date (day, month and year) for which he is liable.

If your answer is "NO":

(1) Mark "X" in column "B".

(2) Leave all other columns blank.

DEFENDANT	(A) "YES" Defendant Is Liable	(B) "NO" Defendant Is Not Liable	(C) FIRST DATE Defendant Became Liable	(D) LAST DATE Defendant Was Liable
C. ARNHOLT SMITH	X		1 March 1962	18 October 1973

III
VIOLATION OF RULE 10b-5 AS "CONTROL PERSON"

Did any of the following defendants violate Rule 10b-5 indirectly as a "control person" of C. ARNHOLT SMITH for any period between March 1, 1962 through October 18, 1973?

If your answer is "YES" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "A".

(2) State in column "C" the first date (day, month and year) for which that defendant is liable.

(3) State in column "D" the last date (day, month and year) for which that defendant is liable.

If your answer is "NO" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "B".

(2) Leave all other columns blank.

DEFENDANT	(A) "YES" Defendant Is Liable	(B) "NO" Defendant Is Not Liable	(C) FIRST DATE Defendant Became Liable	(D) LAST DATE Defendant Was Liable
HELEN SMITH	X		1 March 1971	18 October 1973
CAROL SMITH SHANNON	X		1 March 1971	18 October 1973
JOHN A. SMITH		X		
M. J. COEN	X		1 March 1971	18 October 1973
FIRST NATIONAL FINANCE CORPORATION		X		

IV
VIOLATION OF RULE 10b-5 AS "AIDER AND ABETTOR"

Did any of the following defendants violate Rule 10b-5 indirectly as an *"aider and abettor"* for any period between March 1, 1962 through October 18, 1973?

If your answer is "YES" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "A".

(2) State in column "C" the first date (day, month and year) for which that defendant is liable.

(3) State in column "D" the last date (day, month and year) for which that defendant is liable.

If your answer is "NO" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "B".

(2) Leave all other columns blank.

DEFENDANT	(A) "YES" Defendant Is Liable	(B) "NO" Defendant Is Not Liable	(C) FIRST DATE Defendant Became Liable	(D) LAST DATE Defendant Was Liable
HELEN SMITH	X		1 March 1971	18 October 1973
CAROL SMITH SHANNON	X		1 March 1971	18 October 1973
JOHN A. SMITH	X		1 March 1963	18 October 1973
PHILIP A. TOFT	X		1 March 1968	18 October 1973
M. J. COEN	X		1 March 1971	18 October 1973
FIRST NATIONAL FINANCE CORPORATION	X		1 March 1973	18 October 1973

V

CONSPIRACY TO VIOLATE RULE 10b-5

Did any of the following defendants *conspire* to violate Rule 10b-5 during any period between March 1, 1962 and October 18, 1973?

If your answer is "YES" as to any such defendant:

(1) State the dates (day, month and year) the conspiracy began 1 March 1968 (beginning date) and ended 18 October 1973. (ending date)

(2) Mark "X" after the name of that defendant in column "A".

(3) State in column "C" the first date (day, month and year) on which that defendant joined the conspiracy.

(4) State in column "D" the last date (day, month and year) on which that defendant withdrew from the conspiracy. If no withdrawal, mark not applicable.

If your answer is "NO" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "B".

(2) Leave all other columns blank.

DEFENDANT	(A) "YES" Defendant Is Liable	(B) "NO" Defendant Is Not Liable	(C) FIRST DATE Defendant Joined Conspiracy	(D) LAST DATE Defendant Withdrew From Conspiracy
C. ARNHOLT SMITH	X		1 March 1968	N/A
HELEN SMITH	X		1 March 1971	N/A
CAROL SMITH SHANNON	X		1 March 1971	N/A
JOHN A. SMITH		X		
PHILIP A. TOFT	X		1 March 1968	N/A
M. J. COEN	X		1 March 1971	N/A
FIRST NATIONAL FINANCE CORPORATION		X		

VI
FRAUD

Did any of the following defendants *defraud* the plaintiff class during any period between March 1, 1962 and October 18, 1973?

If your answer is "YES" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "A".

(2) State in column "C" the first date (day, month and year) for which that defendant is liable.

(3) State in column "D" the last date (day, month and year) for which that defendant is liable.

If your answer is "NO" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "B".

(2) Leave all other columns blank.

DEFENDANT	(A) "YES" Defendant Is Liable	(B) "NO" Defendant Is Not Liable	(C) FIRST DATE Defendant Became Liable	(D) LAST DATE Defendant Was Liable
C. ARNHOLT SMITH	X		1 March 1962	18 October 1973
HELEN SMITH	X		1 March 1971	18 October 1973
CAROL SMITH SHANNON	X		1 March 1971	18 October 1973
JOHN A. SMITH	X		1 March 1963	18 October 1973
PHILIP A. TOFT	X		1 March 1968	18 October 1973
M. J. COEN	X		1 March 1971	18 October 1973
FIRST NATIONAL FINANCE CORPORATION	X		1 March 1973	18 October 1973

VII
CONSPIRACY TO DEFRAUD

Did any of the following defendants *conspire to defraud* the plaintiff class during any period between March 1, 1962 and October 18, 1973?

If your answer is "YES" as to any such defendant:

(1) State the dates (day, month and year) the conspiracy began 1 March 1963 (beginning date) and ended 18 October 1973. (ending date)

(2) Mark "X" after the name of that defendant in column "A".

(3) State in column "C" the first date (day, month and year) on which that defendant joined the conspiracy.

(4) State in column "D" the last date (day, month and year) on which that defendant withdrew from the conspiracy. If no withdrawal, mark not applicable.

If your answer is "NO" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "B".

(2) Leave all other columns blank.

DEFENDANT	(A) "YES" Defendant Is Liable	(B) "NO" Defendant Is Not Liable	(C) FIRST DATE Defendant Joined Conspiracy	(D) LAST DATE Defendant Withdrew From Conspiracy
C. ARNHOLT SMITH	X		1 March 1963	18 October 1973
HELEN SMITH	X		1 March 1971	18 October 1973
CAROL SMITH SHANNON	X		1 March 1971	18 October 1973
JOHN A. SMITH	X		1 March 1963	18 October 1973
PHILIP A. TOFT	X		1 March 1968	18 October 1973
M. J. COEN	X		1 March 1971	18 October 1973
FIRST NATIONAL FINANCE CORPORATION	X		1 March 1973	18 October 1973

VIII
ABUSE OF CONTROL

Did any of the following defendants *abuse a position of corporate control* of United States National Bank during any period between March 1, 1962 and October 18, 1973?

If your answer is "YES" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "A".

(2) State in column "C" the first date (day, month and year) for which that defendant is liable.

(3) State in column "D" the last date (day, month and year) for which that defendant is liable.

If your answer is "NO" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "B".

(2) Leave all other columns blank.

DEFENDANT	(A) "YES" Defendant Is Liable	(B) "NO" Defendant Is Not Liable	(C) FIRST DATE Defendant Became Liable	(D) LAST DATE Defendant Was Liable
C. ARNHOLT SMITH	X		1 March 1962	18 October 1973
HELEN SMITH		X		
CAROL SMITH SHANNON		X		
JOHN A. SMITH		X		
M. J. COEN		X		
FIRST NATIONAL FINANCE CORPORATION		X		

IX
CONSPIRACY TO ABUSE CONTROL

Did any of the following defendants *conspire to abuse a position of control* of United States National Bank during any period between March 1, 1962 and October 18, 1973?

If your answer is "YES" as to any such defendant:

(1) State the dates (day, month and year) the conspiracy began 1 March 1963 (beginning date) and ended 18 October 1973. (ending date)

(2) Mark "X" after the name of that defendant in column "A".

(3) State in column "C" the first date (day, month and year) on which that defendant joined the conspiracy.

(4) State in column "D" the last date (day, month and year) on which that defendant withdrew from the conspiracy. If no withdrawal, mark not applicable.

If your answer is "NO" as to any such defendant:

(1) Mark "X" after the name of that defendant in column "B".

(2) Leave all other columns blank.

DEFENDANT	(A) "YES" Defendant Is Liable	(B) "NO" Defendant Is Not Liable	(C) FIRST DATE Defendant Joined Conspiracy	(D) LAST DATE Defendant Withdrew From Conspiracy
C. ARNHOLT SMITH	X		1 March 1963	18 October 1973
HELEN SMITH	X		1 March 1971	18 October 1973
CAROL SMITH SHANNON	X		1 March 1971	18 October 1973
JOHN A. SMITH	X		1 March 1963	18 October 1973
PHILIP A. TOFT	X		1 March 1968	18 October 1973
M. J. COEN	X		1 March 1971	18 October 1973
FIRST NATIONAL FINANCE CORPORATION	X		1 March 1973	18 October 1973

X
DEFAULTING DEFENDANTS

The following defendants have defaulted and judgment must be entered against them accordingly.They are as follows:

DEFENDANT:	
U.S. HOLDING COMPANY	Liable
SAN DIEGO PADRES, INC.	Liable
FIRST CALIFORNIA COMPANY	Liable

DATED: 12 October 1979

/s/ RICHARD W. NELSON
Foreperson

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Consolidated Civil Actions
Nos. 73-460-E and 74-345-E

FRED H. HARMSEN, *et al.*,

Plaintiffs,

vs.

C. ARNHOLT SMITH, *et al.*,

Defendants.

FILED
December 21, 1979
Clerk, U.S. District Court
Southern District of
California

JURY VERDICT

(Second Phase of Trial)

We, the jury in the above-entitled case, unanimously conclude and find as follows:

DEFENDANT C. ARNHOLT SMITH

Count	Date Conspiracy Began (from prior verdict)	First Date Joined Conspiracy or First Date Became Liable (from prior verdict)	Last Date of Conspiracy or Last Date Liable (from prior verdict)	Compensatory Damages
I: Violation of National Banking Act	N/A	March 1, 1962	October 18, 1973	$12,298,708.11
II: Violation of Rule 10b-5	N/A	March 1, 1962	October 18, 1973	$12,061,417.72
V: Conspiracy to Violate Rule 10b-5	March 1, 1968	March 1, 1968	October 18, 1973	$ 8,689,021.25
VI: Fraud	N/A	March 1, 1962	October 18, 1973	$12,061,417.72
VII: Conspiracy to Defraud	March 1, 1963	March 1, 1963	October 18, 1973	$11,614,538.21
VIII: Abuse of Conrol	N/A	March 1, 1962	October 18, 1973	$11,085,494.77
IX: Conspiracy to Abuse Control	March 1, 1963	March 1, 1963	October 18, 1973	$10,722,476.62

(ASSESS DAMAGES FOR EACH COUNT SEPARATELY; VERDICT WILL NOT BE TOTALLED)

PUNITIVE DAMAGES (As to Counts VI, VII, VIII and IX only) $11,000,000.00

DEFENDANT HELEN SMITH

Count	Date Conspiracy Began (from prior verdict)	First Date Joined Conspiracy or First Date Became Liable (from prior verdict)	Last Date of Conspiracy or Last Date Liable (from prior verdict)	Compensatory Damages
III: Violation of Rule 10b-5 as Control Person	N/A	March 1, 1971	October 18, 1973	$6,241,170.02
IV: Violation of Rule 10b-5 as Aider and Abettor	N/A	March 1, 1971	October 18, 1973	$6,241,170.02
V: Conspiracy to Violate Rule 10b-5	March 1, 1968	March 1, 1971	October 18, 1973	$6,241,170.02
VI: Fraud	N/A	March 1, 1971	October 18, 1973	$6,241,170.02
VII: Conspiracy to Defraud	March 1, 1963	March 1, 1971	October 18, 1973	$6,241,170.02
IX: Conspiracy to Abuse Control	March 1, 1963	March 1, 1971	October 18, 1973	$5,858,660.91

(ASSESS DAMAGES FOR EACH COUNT SEPARATELY; VERDICT WILL NOT BE TOTALLED)

PUNITIVE DAMAGES (As to Counts VI, VII and IX only) . . . . . $ 750,000.00

DEFENDANT CAROL SMITH SHANNON

Count	Date Conspiracy Began (from prior verdict)	First Date Joined Conspiracy or First Date Became Liable (from prior verdict)	Last Date of Conspiracy or Last Date Liable (from prior verdict)	Compensatory Damages
III: Violation of Rule 10b-5 as Control Person	N/A	March 1, 1971	October 18, 1973	$6,241,170.02
IV: Violation of Rule 10b-5 as Aider and Abettor	N/A	March 1, 1971	October 18, 1973	$6,241,170.02
V: Conspiracy to Violate Rule 10b-5	March 1, 1968	March 1, 1971	October 18, 1973	$6,241,170.02
VI: Fraud	N/A	March 1, 1971	October 18, 1973	$6,241,170.02
VII: Conspiracy to Defraud	March 1, 1963	March 1, 1971	October 18, 1973	$6,241,170.02
IX: Conspiracy to Abuse Control	March 1, 1963	March 1, 1971	October 18, 1973	$5,858,660.91

(ASSESS DAMAGES FOR EACH COUNT SEPARATELY; VERDICT WILL NOT BE TOTALLED)

PUNITIVE DAMAGES (As to Counts VI, VII and IX only) $3,000,000.00

DEFENDANT PHILIP A. TOFT

Count	Date Conspiracy Began (from prior verdict)	First Date Joined Conspiracy or First Date Became Liable (from prior verdict)	Last Date of Conspiracy or Last Date Liable (from prior verdict)	Compensatory Damages
IV: Violation of Rule 10b-5 as Aider and Abettor	N/A	March 1, 1968	October 18, 1973	$8,689,021.25
V: Conspiracy to Violate Rule 10b-5	March 1, 1968	March 1, 1968	October 18, 1973	$8,689,021.25
VI: Fraud	N/A	March 1, 1968	October 18, 1973	$8,689,021.25
VII: Conspiracy to Defraud	March 1, 1963	March 1, 1968	October 18, 1973	$8,689,021.25
IX: Conspiracy to Abuse Control	March 1, 1963	March 1, 1968	October 18, 1973	$8,083,508.79

(ASSESS DAMAGES FOR EACH COUNT SEPARATELY; VERDICT WILL NOT BE TOTALLED)

PUNITIVE DAMAGES (As to Counts VI, VII and IX only) $1.00

DEFENDANT M. J. COEN

Count	Date Conspiracy Began (from prior verdict)	First Date Joined Conspiracy or First Date Became Liable (from prior verdict)	Last Date of Conspiracy or Last Date Liable (from prior verdict)	Compensatory Damages
III: Violation of Rule 10b-5 as Control Person	N/A	March 1, 1971	October 18, 1973	$6,241,170.02
IV: Violation of Rule 10b-5 as Aider and Abettor	N/A	March 1, 1971	October 18, 1973	$6,241,170.02
V: Conspiracy to Violate Rule 10b-5	March 1, 1968	March 1, 1971	October 18, 1973	$8,689,021.25
VI: Fraud	N/A	March 1, 1971	October 18, 1973	$6,241,170.02
VII: Conspiracy to Defraud	March 1, 1963	March 1, 1971	October 18, 1973	$8,689,021.25
IX: Conspiracy to Abuse Control	March 1, 1963	March 1, 1971	October 18, 1973	$8,083,508.79

(ASSESS DAMAGES FOR EACH COUNT SEPARATELY; VERDICT WILL NOT BE TOTALLED)

PUNITIVE DAMAGES (As to Counts VI, VII and IX only) $3,000,000.00

DEFENDANT JOHN A. SMITH

Count	Date Conspiracy Began (from prior verdict)	First Date Joined Conspiracy or First Date Became Liable (from prior verdict)	Last Date of Conspiracy or Last Date Liable (from prior verdict)	Compensatory Damages
IV: Violation of Rule 10b-5 as Aider and Abettor	N/A	March 1, 1963	October 18, 1973	$11,614,538.21
VI: Fraud	N/A	March 1, 1963	October 18, 1973	$11,614,538.21
VII: Conspiracy to Defraud	March 1, 1963	March 1, 1963	October 18, 1973	$11,614,538.21
IX: Conspiracy to Abuse Control	March 1, 1963	March 1, 1963	October 18, 1973	$10,722,476.62

(ASSESS DAMAGES FOR EACH COUNT SEPARATELY; VERDICT WILL NOT BE TOTALLED)

PUNITIVE DAMAGES (As to Counts VI, VII and IX only) $1.00

DEFENDANT FIRST NATIONAL FINANCE CORPORATION

Count	Date Conspiracy Began (from prior verdict)	First Date Joined Conspiracy or First Date Became Liable (from prior verdict)	Last Date of Conspiracy or Last Date Liable (from prior verdict)	Compensatory Damages
IV: Violation of Rule 10b-5 as Aider and Abettor	N/A	March 1, 1973	October 18, 1973	$2,861,957.38
VI: Fraud	N/A	March 1, 1973	October 18, 1973	$2,861,957.38
VII: Conspiracy to Defraud	March 1, 1963	March 1, 1973	October 18, 1973	$2,861,957.38
IX: Conspiracy to Abuse Control	March 1, 1963	March 1, 1973	October 18, 1973	$2,868,933.92

(ASSESS DAMAGES FOR EACH COUNT SEPARATELY; VERDICT WILL NOT BE TOTALLED)

PUNITIVE DAMAGES (As to Counts VI, VII and IX only) $1.00

DEFAULTING DEFENDANTS

Defaulting Defendant	Compensatory Damages	Punitive Damages
U.S. HOLDING COMPANY	$12,298,708.11	$1.00
SAN DIEGO PADRES	$12,298,708.11	$1.00
FIRST CALIFORNIA COMPANY	$12,298,708.11	$1.00

DATED: December 21, 1979

Richard W. Nelson
FOREMAN OF JURY

Office - Supreme Court, U.S
FILED
NOV 19 1984
L. STEVAS
CLERK

No. 84-734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HELEN SMITH,

Petitioner,

VS.

FRED H. HARMSEN, *et al.*,

Respondents.

Supplemental Brief in Support Of Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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5 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HELEN SMITH,

Petitioner,

VS.

FRED H. HARMSEN, *et al.*,

Respondents.

Supplemental Brief In Support Of Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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In Helen Smith's Petition for a Writ of Certiorari, filed in this Court on November 6, 1984, it was stated that "[t]he Second Circuit has reserved the question" of whether the 1982 amendment to 28 U.S.C.§ 1961, governing interest on money judgments in federal courts, applies to a judgment entered prior to the effective date of the amendment. *Id.* at 12. That court has now answered the question with a resounding "No." *Litton Systems, Inc. v. AT&T,* No. 83-7744 (2d Cir. Oct. 16, 1984), 1984-2 Trade Cas. (CCH) ¶ 66,239.

The Second Circuit concluded that "amended section 1961 is not to be construed to apply to judgments entered before its effective date, even though on that date they were pending on direct review." 1984-2 Trade Cas. at p. 67,030 (footnote omitted). The court also rejected the alternative argument, adopted by the Ninth Circuit below, that the 1982

amendment should operate to increase the rate of interest on a pre-effective date judgment as of the effective date of the amendment (October 1, 1982) rather than as of the date of the judgment, but at the T-bill rate as it stood immediately prior to the date of the entry of the judgment. Rather, the court construed "amended section 1961 to have no application to judgments entered before October 1, 1982." *Id.* In so concluding, the Second Circuit observed:

> Litton contends that the rate should be the average coupon yield of Treasury bills auctioned just prior to June 30, 1981, the date the judgment [was] entered. *That makes no economic sense at all and could not have been intended by Congress.* Since Litton's judgment was properly accruing interest at 9% [the proper rate under New York law and the unamended version of § 1961] from the date of its entry until at least October 1, 1982, it would be an unwarranted windfall to have it accrue interest thereafter at a rate determined by market conditions 15 months earlier. On the other hand, if the rate accruing from the effective date of the statute was the average coupon yield of Treasury bills auctioned just prior to that effective date, the result would be economically defensible, but hopelessly inconsistent with the terms of the statute, which tie the applicable rate to the date of the judgment. We therefore reject Litton's fall-back position, but see *Handgards, Inc. v. Ethicon, Inc.*, 552 F. Supp. 820 (N.D. Cal. 1982), *aff'd*, ____ F.2d ____ (9th Cir. 1984).

Id. (emphasis added). In closing, the Second Circuit observed that

> there would not be unfairness in applying an increased rate only from the effective date of the new statute if it was reasonably clear to a judgment debtor that a new

> rate became applicable to the judgment at that date. But, as we have pointed out, that intermediate position is so plainly contrary to the statutory scheme that Congress selected in amending section 1961 that we cannot accept it, and it would be unjust to expect a judgment debtor to have so understood the statute.

Id. at p. 67,031.

The fact that the judgment at issue in *Litton* was entered on June 30, 1980, more than twenty-seven months prior to the effective date of the amendment, supports petitioner's argument that the question presented regarding retroactive application of the 1982 amendment to 28 U.S.C. § 1961 will continue to be litigated frequently, "as more judgments entered prior to the Act's effective date wend their way through the appellate process." Petition for Cert., at 13 (footnote omitted). Thus the question is more important, and arises much more frequently, than the typical "transition period" question. Not only is further expenditure of scarce judicial resources on this issue wasteful and unnecessary, but review and correction by this Court of the ruling below is necessary to effectuate Congress's express intent that money judgments in civil cases in the federal courts be subject to a *uniform* rate of interest. *See* S. Rep. No. 275, 97th Cong., 2d Sess. 1, 11, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 21.

CONCLUSION

For the reasons set forth in her petition and in this supplemental brief, petitioner respectfully prays that a writ of certiorari issue to review and correct the rulings of the Ninth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 6 1984
ALEXANDER L. STEVAS
CLERK

No. 84-734

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HELEN SMITH,
Petitioner,

vs.

FRED H. HARMSEN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where the jury was properly instructed that under a pendent state law claim all holders of the common stock of the United States National Bank as of the date of its insolvency were entitled to damages, does entry of judgment on that pendent claim in favor of such shareholders violate the Seventh Amendment?

2. Does the trial court's "reasonable interpretation" of the October, 1982 amendment to 28 U.S.C. § 1961, relating to calculation of post-judgment interest during the "transition period" surrounding that amendment, warrant review by this Court?

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No. 84-734

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents, plaintiffs below, respectfully urge this Court to deny the petition of Helen Smith for a writ of certiorari.

Helen's primary claim, phrased in terms of the Seventh Amendment, in fact involves only the re-examination of a pendent state claim, uniquely grounded in California law. Nothing in the Ninth Circuit's handling of that claim in any way conflicts with other decisions of this Court or of other Courts of Appeal.

Helen's secondary claim concerns the proper method of computing post-judgment interest in that small group of cases where the relevant post-judgment period straddles the 1982 amendment to 28 U.S.C. § 1961. The Ninth Cir-

[1]Hereinafter "Helen" or "Mrs. Smith."

cuit's disposition of this issue, in its unpublished memorandum decision, does not raise an important question of federal law which requires review by this Court.

I

STATEMENT OF THE CASE

The United States National Bank ("USNB") was declared insolvent by the Comptroller of the Currency in October, 1973. Shortly thereafter, this action was filed on behalf of the shareholders of USNB, who had lost the entire value of their shareholdings. The matter was brought to trial in 1979, and the jury's verdict in favor of plaintiffs was rendered in December, 1979. The instant petition for certiorari is the most recent in a long series of appeals and petitions filed by Helen.

The class action complaint in this case alleged that the action was brought on behalf of *all USNB shareholders* (except defendants) *as of October 18, 1973*, the date that the receiver was appointed by the Comptroller. This class was certified under Rule 23, and that certification was upheld on appeal. *Harmsen v. Smith*, 693 F.2d 932, 942 (9th Cir. 1982), cert. denied ..... U.S. ....., 104 S.Ct. (1983).

The complaint alleged several different theories of liability, some federal (National Bank Act claims, plus claims for primary and secondary violations of the federal securities laws) and some pendent state claims (fraud, conspiracy to defraud, abuse of control and conspiracy to abuse control). As to petitioner Helen Smith, the jury found liability on three federal and three pendent state claims. Among the pendent state claims Helen was found liable for was *conspiracy to abuse control*, the "Count IX" claim involved in this petition.

The claim for conspiracy to abuse control was premised on the California Supreme Court's decision in *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969). In accordance with that case, and with the general principles governing conspiracy liability in California, the jury was instructed that all non-defendant sehareholders of USNB at the time of its collapse were entitled to recover on this count, regardless of "purchaser" or "non-purchaser" status (Plaintiffs' Instructions Nos. 13 and 16.) The jury was further instructed that damages resulting from conspiracy to abuse control could, under California law, be assessed for the entire period of the conspiracy, regardless of when each defendant joined the conspiracy. (Plaintiffs' Instruction No. 21; see *DeVries v. Brumback*, 53 Cal.2d 643, 648 (1960).)

Based upon these instructions, the jury entered its verdicts against Helen. Among other things, it found Helen liable for conspiracy to abuse control in the amount of $5,858,660.91. These verdicts, and the judgment entered on them, were affirmed by the Ninth Circuit in *Harmsen v. Smith, supra.* Helen's petition to this Court for certiorari was denied. 104 S.Ct. 89 (1983)

Pursuant to instructions from the Ninth Circuit, on remand the district court (Hon. William B. Enright) entered judgment describing the class members to whom each defendant was liable on each count. Among other things, that judgment specified that each defendant found liable under Count IX was liable to "all common shareholders of USNB on 10/18/73."

In addition, Judge Enright made a ruling on post-judgment interest in light of the amendment to 28 U.S.C.

§ 1961 in October, 1982. That ruling represented an intermediate position between the interpretations advanced by the plaintiffs and by Helen.

Helen took two actions in response to these various rulings at virtually the same time: (1) She petitioned to the Ninth Circuit for a *writ of mandamus* (9th Cir., No. 84-7035), challenging, *inter alia,* the two issues challenged in the instant petition; and (2) She filed an *appeal* to the Ninth Circuit, challenging the identical issues.

Helen's writ petition was denied by the Ninth Circuit on April 9, 1984. The Court's order reads, in pertinent part, as follows:

> The petition is denied. Petitioners fail to show that the district court erred in either its amended judgment or the other challenged orders. See *Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977).
>
> (See Appendix B hereto)

The appeal was heard by the Ninth Circuit on June 13, 1984 and decided, by memorandum decision, on August 6, 1984. As reflected at Appendix B to Helen's instant Petition, that memorandum decision reads as follows:

> These appeals are without merit. We properly concluded in *Harmsen v. Smith,* 693 F.2d 932 (9th Cir. 1982), *cert. denied,* 104 S.Ct. 89 (1983), that there was sufficient evidence to support a finding of liability of Helen Smith. The law of the case should stand unless there is substantially new evidence, new controlling authority, or unless the prior decision was clearly erroneous. *Handi Investment Co. v. Mobil Oil Corp.,* 653 F.2d 391, 392 (9th Cir. 1981). Appellants have made no showing of mistake by this court.

Appellants' other arguments must also fail. The amended judgment does not violate the seventh amendment. The jury was instructed that according to California law, see *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969), liability runs to all USNB shareholders on Count IX. Thus, the damage award on that count is proper.

The district court properly calculated the interest rate. The purpose of the *nunc pro tunc* order was to protect appellees from the consequences of delay not attributable to their own fault and should not operate to deprive them of a change in law that will benefit them. Nothing in 28 U.S.C. § 1961 rules out the district court's reasonable interpretation.

The amended judgment does identify the classes with sufficient specificity to satisfy Fed. R. Civ. P. 23. Rule 23(c)(3) requires the judgment to "include and describe" the class, and amended judgment provides a clear description.

Finally, the amended judgment is sufficiently final to support execution. Appellants cannot successfully argue both that the amended judgment is final for purposes of review but not for purposes of execution.

Affirmed.

This petition followed.

II

REASONS REVIEW SHOULD BE DENIED

A. The "Seventh Amendment" Issue Involves Only Questions of State Law

Helen has repeated in this Court her efforts, made at both the district and the circuit court levels, to transmute her disappointment with the result in this case into some

sort of constitutional violation. At all prior levels, these efforts have been rebuffed, largely based on state law.

Helen's contention that judgment on Count IX in favor of all USNB common shareholders on October 18, 1973 violates the Seventh Amendment by "expanding" liability beyond that determined by the jury is without merit. Liability on this count runs in favor of all shareholders on that date because that is the theory on which the case was tried. The judgment on Count IX is in line with the jury's verdicts, the jury's manifest intentions, and the procedural history of the case. Hence there is simply no Seventh Amendment violation.

The judgment originally entered in January, 1980 was amended, per the instructions of the Ninth Circuit, to reflect the "sub-classes" of plaintiffs entitled to recovery on each count. For the federal securities (Rule 10b-5) related counts, recovery was limited to those USNB shareholders who purchased their shares during specified intervals of time, corresponding to each defendant's period of liability. With regard to Count IX, however, the claim for conspiracy to abuse control under California law, the judgment specified that *all* holders of USNB stock at the time of the Bank's collapse are entitled to recover. This is the theory on which the case was tried; this reflects the instructions which were given to the jury; this corresponds to California law as set out by the California Supreme Court in *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969); and this is the proper standard for recovery.

However, Helen contends that damages should *not* be awarded to all USNB shareholders on this count, regardless of the jury instructions and the California law, because

her "analysis" of the jury verdict suggests that the jury "must have" intended something different.

The trial court, Judge William B. Enright, quite properly declined to "dissect the jury verdict based on defendant's supposition." As he stated, in his Memorandum Decision of December 1, 1983:

> As to Helen Smith's argument that her liability extends only to those who purchased USNB stock after February 28, 1971, this court declines to dissect the jury verdict based on the defendant's supposition. Under Jury Instruction 21, any defendant could be found liable for all damages flowing from the conspiracy regardless of when they joined the agreement. Helen is liable to all USNB shareholders in the amount specified under Count IX.
>
> (Appendix A, p. A-6)

Instead of relying on "supposition", Judge Enright relied upon the law as given to the jury and as articulated in the controlling cases, all of which require that for this state law claim, recovery should be made available to all holders of stock at the time of the Bank's collapse.

This was made clear in the jury instructions. Instruction 16 informed the jury that they could award damages for all shares held by plaintiffs, in connection with the abuse of control counts, even if those shares were acquired by gift, inheritance, bonus or dividend, citing to *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969) and California Civil Code § 3333. Similarly, Instruction 13 provided:

> If you find that the plaintiffs currently possess USNB stock of no market value because of defendants' abuse of control and/or conspiracy to abuse control, you should find that the damages sustained include the full

> purchase price of the shares of USNB stock purchased by plaintiffs. (Citing *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93 (1969) and California Civil Code § 3333)

In addition, Instruction 21 provided:

> [F]or conspiracy to abuse control . . . [y]ou may find any or all of these defendants liable for all damages which accrued to plaintiffs as a result of this conspiracy since the date of its beginning, regardless of when each such defendant joined in this conspiracy. (Citing *DeVries v. Brumback*, 53 Cal.2d 643, 648 (1960))

Thus, as to Count IX liability for abuse of control, the damages awarded were *not* limited to a "sub-class" of purchasers during any given time period, as in the other counts against petitioner. Rather, as per the trial court instructions and the fundamentals of the state law theory of the case, *all* shareholders were entitled to recover damages.

Two things are apparent. First, no federal question is involved in this matter. The scope of the fiduciary responsibility imposed by *Jones v. Ahmanson, supra,* is a matter within the sound discretion of the California Supreme Court, as is the appropriate measure of damages. Second, the only improper "alteration" of the jury's verdict is that sought to be accomplished by Helen in this proceeding. Helen's tortured analysis of what the jury "must have thought" or "must have found" in its verdict five years ago is simply unsupported by the evidence, the instructions, the theory of the case or the verdict forms. Helen's argument would require precisely the kind of "re-examination" of the jury's verdict which the Seventh Amendment prohibits.

It is possible that there are some unresolved issues concerning the nature of questions appropriate for jury,

rather than judicial, determination in a class context. This case however, does not present those issues. It is therefore requested that the instant petition be denied.

B. The Question of Post-Judgment Interest under 28 U.S.C. § 1961 Does Not Merit Review

Helen's secondary contention in this petition is that the Ninth Circuit erroneously refused to disturb Judge Enright's disposition of the post-judgment issue question. This claim raises no issue of sufficient significance to warrant review by this Court.

This case is among the relative handful of federal cases involving a judgment *entered* prior to October, 1982 but finally *affirmed* after that date. In these few cases, the calculation of post-judgment interest is complicated by the fact that 28 U.S.C. § 1961 was amended effective October, 1982. Prior to that amendment, federal judgments bore interest at the state-imposed legal rate. After that amendment, such judgments bore interest at a rate based on the auction price of Treasury bills. The amendment did not provide specific guidance for the "straddle" situation.

In the instant case, Judge Enright heard argument from defendants (including Helen Smith) that interest at the lower (7%) state court rates should apply throughout the post-judgment period. He also heard argument from plaintiffs that interest at the higher (federal T-bill rates) should apply throughout the post-judgment period. His decision was an intermediate one:

> Interest on the judgments of all defendants shall be calculated to include interest at the rate of 7% from January 4, 1980 through October 1, 1982. From the

> period October 1, 1983 [sic—1982] through the present date, interest will be fixed by the option price of U.S. Treasury bills immediately prior to January 4, 1980.
>
> (12/19/83 Order, Appendix C to Petition)

The Ninth Circuit considered the propriety of this ruling twice, once on Helen's petition for writ of mandamus and once on Helen's appeal. Each time, it found no reason to disturb Judge Enright's ruling. In its unpublished memorandum decision, the Ninth Circuit stated as follows:

> The district court properly calculated the interest rate. The purpose of the *nunc pro tunc* order was to protect appellees from the consequences of delay not attributable to their own fault and should not operate to deprive them of a change in law that will benefit them. Nothing in 28 U.S.C. § 1961 rules out the district court's reasonable interpretation.
>
> (Appendix A to Petition)

That the Second Circuit may have approved a different approach does not invalidate the Ninth Circuit's reasoning. More to the point, the mere fact that different courts may take different approaches to this question does not make the question itself sufficiently important to justify review by this Court. As Helen herself points out, this issue is at best a question relating to the "transition period." Indeed, Helen's Supplemental Brief (p. 3) aptly, if inadvertently, describes the situation: "Further expenditure of scarce judicial resources on this issue [would be] wasteful and unnecessary."

There are no "special and important reasons" to grant review of this issue. Rule 17, Rules of the Supreme Court.

III

CONCLUSION

It is respectfully requested that Helen Smith's most recent petition for certiorari be denied.

DATED: November 27, 1984

Respectfully submitted,

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Appendix A

United States District Court
Southern District of California
Civil Nos. 73-460-E(M)
74-345-E(M)

Fred H. Harmsen, et al.,
Plaintiffs,

v.

C. Arnholt Smith, et al.,
Defendants.

[Filed Dec. 1, 1983]

MEMORANDUM DECISION

FACTS/BACKGROUND

In December 1979, the damage verdict in this class action securities action was returned against all defendants. In December 1982, the Ninth Circuit affirmed the judgments as to all defendants except J. A. Smith and First National Finance Corporation. *Harmsen v. Smith,* 693 F.2d 932 (9th Cir. 1982). After the defendants' petition for certiorari was denied, the mandate from the Ninth Circuit issued on October 24, 1983.

On November 21, 1983, this court heard argument from counsel on: (1) motions from defendants Helen Smith and Carol Smith Shannon to amend or correct the judgment, and (2) Receiver Tellam's application for authority to execute a listing on portions of the Valley Lane Farms property.

HOLDING

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at the hearing, and for the reasons set forth herein, the court takes the following action:

1. Denies, in part, the defendants' motions to amend or correct the judgment. The judgment prepared by plaintiffs' counsel, amended to comply with the dictates of the *Harmsen* decision, will be entered *nunc pro tunc* as of January 4, 1980.

2. Appoints David R. Hickey as Special Master to perform the accounting and administrative functions required in collecting and distributing the damage funds in this case.

3. Authorizes the plaintiffs to take the necessary steps to insure collection of the damage amounts due, including implementation of the Trust Agreements securing the judgments of defendants.

4. Takes under submission plaintiffs' suggested format for claims forms to the class members, pending further briefing by the parties.

5. Grants Mr. Tellam's application to execute a listing on the Valley Lane Farms property. The preliminary injunction restraining Helen Smith and the Bank of Irvine from foreclosing on Lot 7 of the property is extended to the expiration date of Merrill Lynch's 60-day exclusive listing period.

DISCUSSION

I. ANALYSIS OF THE HARMSEN DECISION

The Ninth Circuit specifically affirmed the judgments of all defendants except J. A. Smith and FNFC. *Harmsen, supra,* at 948. The *Harmsen* court directed this court to implement five steps upon remand:

(1) *Enter Judgment in Accordance with Fed. R. Civ. P. 23*

This entails entering an amended judgment describing the members of the class to whom each defendant was found liable on each count. The *Harmsen* court expressly noted that the earlier failure to include these descriptions did not prejudice the defendants. *Id.* at 942. The amended judgment properly reflects the subclass descriptions.

(2) *Return Excess Damage Funds After Distribution*

The Ninth Circuit instructed that "if there are excess damage funds after distribution, the district court should consider any feasible methods of returning that excess, with appropriate interest, to defendants." *Id.* at 946. Despite the defendants' assertions to the contrary, the determination of excess funds should take place following collection and distribution of the damages. Should excess funds remain *after* distribution to the class members, this court will, upon advisement from all parties, devise and implement a procedure for returning such funds to the defendants.

(3) *Consider Effect of Westgate California Insurance Company*

Harmsen indicates that the Westgate Insurance Company should not recover damages as a member of the

plaintiff class because defendant C. Arnholt Smith was the controlling shareholder in the company. *Id.* at 947. The Ninth Circuit directs this court to consider a possible reduction in the damages amount in light of this apparent conflict. In the interest of judicial economy, plaintiffs have agreed to exclude the entire damage award to Westgate Insurance Company from the total judgment. The amended judgment reflects this reduction of $1,000,008.

(4) *Offset Damages Already Paid by Settling Defendants*

The *Harmsen* court directs this court to offset settlements from other defendants. *Id.* at 948. The amended judgment reflects the $838,000 already paid by settling defendants as an offset to the compensatory damages owed by each defendant.

(5) *Establish a Claims Procedure*

The Ninth Circuit directs this court to design and implement a claims procedure. *Id.* at 948. This procedure is essentially mechanical in nature and entails a determination of the amount invested and the interest bought by each claimant and computation of the damages owed for each class member. *Arthur Young v. United States District Court,* 549 F.2d 686, 696 (9th Cir. 1977). The defendants' suggestion that the claims process must involve a reexamination of the class damages on an individual basis contravenes the Ninth Circuit rule that damage-related issues such as reliance may be proved on a class-wide basis. *Blackie v. Barrack,* 524 F.2d 891, 906 (9th Cir. 1975). In that regard, the claims procedure employed by this court will be straightforward collection and distribution of damages to the class, not a retrial of the substantive damage issues

on an individual basis. The court adopts the plaintiffs' proposed sequence for the claims process: entry of judgment, collection, mailing of claim forms, claim processing, claim payment and, finally, return of excess funds, if any.

The first steps in this process, entry of the amended judgment *nunc pro tunc* and collection of the damage awards, shall proceed immediately. To this effect, the court authorizes the plaintiffs' counsel to commence collection and appoints Special Master Hickey. The actual mailing of claim forms to the class will be delayed for a short period to permit further consideration on the questionnaire to be presented to the class members. Counsel are requested to submit additional briefing on the following questions:

> (1) Whether the defendants' proposed questions 6 and 7 should be included in the claim form under the Ninth Circuit's decision in *Harmsen*?
>
> (2) Whether either side will be prejudiced by the inclusion or exclusion of the proposed additions?

Counsel should *file* briefs on these two questions no later than ten days after the entry of this decision and order.

The court hereby rejects the other arguments advanced by defendants in connection with the claims procedure. Specifically, the court finds the defendants are liable to *all* USNB shareholders under Count IX (conspiracy to abuse control). Defendant Shannon's attempt to dispute the findings of the Special Master should have been made at trial, not in connection with a claims procedure. The issue of disputed shares was left for resolution by the trial jury based on the information provided in Special Master Hickey's report. The Ninth Circuit approved this procedure

for calculating injury to the class. *Harmsen, supra,* at 946. As to Helen Smith's argument that her liability extends only to those who purchased USNB stock after February 28, 1971, this court declines to dissect the jury verdict based on the defendant's supposition. Under Jury Instruction 21, any defendant could be found liable for all damages flowing from the conspiracy regardless of when they joined the agreement. Helen is liable to *all* USNB shareholders in the amount specified under Count IX.

Helen Smith moves for a reduction of the punitive damages against her in relation to any reduction in her total liability. The power to order a remittitur of punitive damages is within the discretion of this court. *Anglo-American General Agents v. Jackson National Life Ins. Co.,* 83 F.R.D. 41, 45 (N.D. Cal. 1979). While no reduction in the punitive award against Helen is appropriate at this juncture, the defendants are free to move for a review of the punitive award if the number of actual claims submitted significantly decreases the defendants' final compensatory liability. A reevaluation of the punitive damages would take place *after* completion of the claims process. Defendants are liable at this point for the full amount of their punitive damages and plaintiffs are free to collect those amounts. Should this court determine that a subsequent reduction is appropriate, the excess punitive damages would be returned in the same manner as any excess compensatory award.

II. LISTING OF VALLEY LANE FARMS

This court finds that Mr. Tellam's request to list portions of the Valley Lane Farms with Merrill Lynch Commercial Real Estate is appropriate under the Trust

Agreement entered into by Carl Smith Shannon. As indicated *supra,* the execution of the amended judgment should not be stayed.

The court hereby extends the preliminary injunction which presently restrains Helen Smith or the Bank of Irvine from foreclosing on Lot 7 of the property. Whatever hardships this short extension may cause lienholders is outweighed by the benefit of facilitating the sale of the trust property. This extension will continue through the exclusive listing period granted to Merrill Lynch.

DATED: December 1, 1983.

/s/ William B. Enright, Judge
United States District Court

Copies to:
All parties

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 84-7035

Helen Smith,
Petitioner,

vs.

United States District Court for the
Southern District of California,
Respondent,
Fred H. Harmsen, Ken Hansen, et al.,
Real Parties in Interest.

Order

Before: Skopil and Schroeder, Circuit Judges, and Aguilar, District Judge*

Petitioner Carol Smith Shannon is granted permission to join Smith's mandamus petition. The petition is denied. Petitioners fail to show that the district court erred in either its amended judgment or the other challenged orders. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

---

*The Honorable Robert Aguilar, United States District Judge for the Northern District of California, sitting by designation.

AFFIDAVIT OF SERVICE BY MAIL

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Patricia M. Cde Baca , being first duly sworn, says:

That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 190 Ninth Street, San Francisco, California 94103; that affiant served the required number of copies of the attached Brief In Opposition "Harmsen Vs. Smith" In the Supreme Court of the U.S. on each of the following, by placing same in an envelope addressed (respectively) as follows:

See attached list

that each of said envelopes was then, on December 4, 1984, sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid; and that there is delivery service by United States mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed.

All parties required to be served have been served.

Patricia M. Cde Baca

Subscribed and sworn to before me

this 4 day of December, 1984

Jane Bourke

Notary Public in and for the City and County of San Francisco, State of California

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No. 84-734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HELEN SMITH,

Petitioner,

vs.

FRED H. HARMSEN, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HELEN SMITH,

Petitioner,

vs.

FRED H. HARMSEN, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I

Respondents' brief in opposition to the certiorari petition in this case reflects the same misapprehension of the seventh amendment question presented as did the opinion of the Ninth Circuit below. No issue of state law is involved.

Petitioner's argument is really quite simple. The jury found petitioner liable on Count IX, for conspiracy to abuse control, and on other counts. In its special verdicts (App. to Cert. Pet. at 33a, 38a), the jury specifically found that petitioner participated in the conspiracy only during a limited period of time, and, accordingly, *awarded damages against petitioner on Count IX in an amount far less than the total amount of damages suffered by all shareholders.* Yet the district court, in attempting to comply with the requirement of Fed. R. Civ. P. 23(c)(3) that the judgment "specify or describe those . . . whom the court finds to be members of the class," described a class comprising all persons to whom petitioner *could have been* found liable

under state law (i.e., all shareholders as of the date the bank failed), rather than a class comprising those to whom the jury *actually* found petitioner liable (those who acquired their shares during the period the jury found petitioner to have participated in the conspiracy).

Petitioner does not now quibble with the jury instruction to the effect that petitioner *could* be found liable to all shareholders, or with the Ninth Circuit's assertion that, as an abstract proposition, California law permits such expansive recovery. Rather, petitioner's argument derives from the obvious fact that the jury did not in fact impose liability on petitioner except as to those class members who acquired their shares during the period petitioner was found to have participated in the conspiracy. Thus the district court's specification of the class has the effect of expanding petitioner's liability as found by the jury.

One need not "dissect" the jury verdict to understand the correctness of petitioner's position. Rather, it requires a willful ignorance of the specific and detailed facts found by the jury to conclude that any and all class members may claim against the funds paid by petitioner, as the district court's judgment allows. It is a simple and obvious fact that the district court's specification of the class pursuant to Rule 23(c)(3) permits recovery against petitioner by class members who whom the jury clearly and unequivocally found her not liable. Thus the district court's attempted compliance with Rule 23(c)(3), affirmed by the Ninth Circuit, has the effect of redetermining facts found by the jury, in violation of the seventh amendment.

II

The second question presented in the petition for certiorari concerns the application of the 1982 amendment to 18 U.S.C. § 1961 to a judgment entered before the effective date of the amendment. That respondents make no effort to defend the Ninth Circuit's ruling on this issue on the

merits gives rise to an inference regarding the inherent difficulty of that task. Instead, respondents suggest only that the question is not sufficiently important to justify review by this Court. The suggestion is wrong, for two reasons.

First, as suggested in the petition and uncontradicted by respondents, the issue has been and continues to be litigated with appalling frequency; indeed, the dates of the underlying judgments at issue in the appellate cases decided to date suggest that the volume of litigation on this issue will increase, not decrease. A ruling on this issue by this Court would put a halt to the enormous drain on the admittedly scarce resources of the district courts and courts of appeals.

Second, the mere existence of a split of authority in the circuits undercuts the express congressional purpose of achieving uniformity in the interest rates applied to federal court judgments. Resolution of this split of authority is necessary to effectuate that intent.

CONCLUSION

For the reasons set forth in her petition, her supplemental brief, and this reply, petitioner respectfully prays that a writ of certiorari issue to review and correct the rulings of the Ninth Circuit.

Respectfully submitted,

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